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No. 90-380

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CONSOLIDATED RAIL CORPORATION,

Petitioner,

—against—

DELAWARE & HUDSON RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION

JAMES K. MANNING
Counsel of Record
ELIZABETH STORCH
Brown & Wood
One World Trade Center
New York, New York 10048
(212) 839-5300

Attorneys for Respondent
Delaware & Hudson
Railway Company

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SUPPLEMENTAL BRIEF IN OPPOSITION

Respondent, Delaware & Hudson Railway Company ("D&H") submits this supplemental brief in opposition to the brief for the United States as amicus curiae which was submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.[1]

PRELIMINARY STATEMENT

Like Consolidated Rail Corporation ("Conrail"), the Solicitor General, in his brief in support of the petition by Conrail for a writ of certiorari, does not demonstrate that this case presents conflicts with other decisions, significant legal issues or other "special and important reasons" for granting a writ of certiorari. Sup. Ct. R. 10. In fact, the Solicitor General provides as much support for D&H's opposition to the petition for a writ of certiorari as he does for Conrail's petition. First, the Solicitor General does not contend (as does Conrail) that the decision below conflicts with the decisions of other courts of appeals. Conrail contends the decision below conflicts with the decisions of other courts of appeals because those courts have held "that a legitimate business practice is immune from Section 2 liability, even if there is also evidence of injury to a particular competitor or anticompetitive intent." (Pet. at 18.) In direct opposition to this contention, the Solicitor General stated:

> Contrary to Conrail (see Pet. 14, 17-21), we do not understand the court of appeals to have held that intent alone can transform otherwise lawful conduct into a violation; consequently, we do not believe that the second question presented by the petition (Pet. (i)) is raised by this case.

(Amicus at 12 n.17.) Second, Conrail argues that this case presents significant legal issues warranting review by this Court since "[t]his case . . . squarely presents the question whether the essential facilities doctrine permits recovery that

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1 D&H's corporate affiliates are listed in D&H's initial brief.

would otherwise be unavailable under Section 2 [of the Sherman Act]." (Pet. at 22-23.) The Solicitor General, however, does not object to the reliance by the court below on the essential facilities doctrine in determining whether a question of fact exists. In fact, he specifically adopts the articulation of that doctrine in *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), and argues only that the present case is distinguishable from this Court's decision in *United States* v. *Terminal R.R. Ass'n*, 224 U.S. 383 (1912). (Amicus at 15-16.) Third, the Solicitor General concedes that there are not "special and important reasons" for granting a writ of certiorari at the present time. While Conrail ignores the fact that review by this Court is inappropriate at the present time, the Solicitor General states that there are "obvious prudential factors pointing in favor of letting this case go, namely, it is of course in an interlocutory posture, and the court of appeals was less than clear about the nature of the required 'reasonable' dealing that it applied to Conrail's conduct." (Amicus at 19.) Thus, the Solicitor General has substantially undercut Conrail's contentions in these various regards.

REASONS FOR DENYING THE WRIT

I.

THE SOLICITOR GENERAL IGNORES FACTS IN THE RECORD BELOW

The Solicitor General's brief in support of the petition by Conrail for a writ of certiorari rests on the mistaken premise that D&H challenges only Conrail's use of its so-called "make or buy" policy. On the contrary, D&H contends that both (1) Conrail's outright refusals to concur in joint rates with D&H and (2) its "make or buy" policy serve as separate (although related) factual predicates for D&H's monopolization claim. In the former regard, there is ample evidence that Conrail routinely refused to concur in joint rates, thus effectively precluding D&H from competing with Conrail for ser-

vice to those consignees served only by the Conrail tracks that surrounded D&H. For instance, Mr. Behe, Conrail's Line of Business Unit Manager for Forest Products from 1982 through 1985, testified as to his outright refusal to concur in joint rate reductions initiated by the Canadian National Railway ("CN") in instances where the proposed rate reductions related to routes involving D&H. (Resp. A. 3A).

In any event, contrary to the assertion of the Solicitor General, the court of appeals correctly determined that the "make or buy" policy could be the functional equivalent of an outright refusal to cooperate by Conrail. *Delaware & Hudson Ry. Co.* v. *Consolidated Rail Corp.*, 902 F.2d 174, 177 (2d Cir. 1990) (Petition Appendix ("A") 4a). Pursuant to the "make or buy" policy, Conrail made D&H's cost of access to Conrail's routes prohibitively expensive. Under the "make or buy" policy, Conrail conditioned its concurrence in joint rates involving D&H on receiving the same amount of contribution (i.e., revenues less expenses) over its short haul route (the route involving D&H) as it would receive over its long haul route (the route that does not involve D&H) thus effectively shifting much of Conrail's costs to D&H and proportionately *decreasing* D&H's revenues. Conrail, like the monopolist defendant in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), was making D&H " 'an offer that [it] could not accept.' " *Id.* at 592 (citation omitted.)

This effect is evident from the example relating to the carriage of newsprint from Quebec to Lancaster, Pennsylvania that the court of appeals adopted in its opinion. Nevertheless, the Solicitor General objects to the use of that example even though both Conrail and D&H relied upon it in their briefs before the court of appeals, 902 F.2d at 176-77 (A. 3a.), and Conrail first postulated it in the district court. *See Delaware & Hudson Ry. Co.* v. *Consolidated Rail Corp.*, 724 F. Supp. 1073, 1077 (N.D.N.Y. 1989) (A. 21a). Moreover, that example is grounded in fact. Conrail adopted that example directly from the deposition testimony of Mr. Behe concerning the

request of CN to offer a reduced rate to a shipper in Quebec on paper traffic to Lancaster, Pennsylvania. *See* Memorandum of Law in Support of Motion of Defendant Consolidated Rail Corporation for Summary Judgment at 23. Thus, Conrail does not and cannot contest the description of the effect of the application of the "make or buy" policy on D&H which was adopted by the court of appeals. Given the fact that the example at issue has been adopted by Conrail below, D&H believes it inappropriate for the Solicitor General, as amicus curiae, to now put it at issue. *See Knetsch* v. *United States*, 364 U.S. 361, 370 (1960) (declining to pass upon an argument made by amicus curiae which had never been advanced by petitioners).

Although the district court and the court of appeals applied hypothetical revenue and cost estimates to the Lancaster example put forth by Conrail in its briefs below (presumably because Conrail did not supply those figures itself), the record contains evidence which indicates that the assumptions adopted by the courts below were correct.[2] In fact, when the court of appeals outlined some of the evidence which would support a jury finding that Conrail's actions were anticompetitive, it referred to an actual instance of the application of the "make or buy" policy which verifies the court of appeals's reliance upon the Lancaster example. In the instance alluded to by the court of appeals, a pricing analyst for Conrail concluded that the application of the "make or buy" policy to a joint route for traffic from Nova Scotia to Pennsylvania would result in a division of revenues that "would be almost ludicrously low" from the point of view of D&H. 902 F.2d at 178-79 (A. 7a).[3]

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2 In addition, Conrail also relies upon hypothetical figures with respect to the Lancaster example to demonstrate the effect of the "make or buy" policy. *See* Brief of Defendant-Appellee at 24-25 n.15.

3 This factual support for the conclusion of the pricing analyst is contained in plaintiff's deposition exhibit 23, a Memorandum dated January 4, 1984 from D.S. Kalapos to C.N. Marshall.

Nevertheless, the Solicitor General argues that D&H should have been able to compete with Conrail had it been more efficient than Conrail (i.e., had its costs been lower than Conrail's). This argument must be rejected on two grounds. First, any issue relating to D&H's efficiency is a question of fact and cannot be decided by this Court as a matter of law based upon the supposition by the Solicitor General that such efficiencies were achievable. Second, the efficiency argument does not begin to address the outright refusals by Conrail to concur in joint rates involving D&H.

II.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THE STANDARD ENUNCIATED BY THIS COURT IN *ASPEN SKIING CO.*

The Solicitor General appears to argue that the court of appeals did not apply the standard enunciated by this Court in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), because it considered the effect Conrail's actions had on D&H. Here, the Solicitor General overlooks Conrail's refusals to concur and compares the facts in *Aspen* only to Conrail's "make or buy" policy. In addition, the Solicitor General overlooks both the procedural setting of *Aspen* as well as a substantial amount of evidence as to the intent and effect of Conrail's actions.

As to the procedural setting of *Aspen*, this Court was reviewing a trial record to determine whether it supported the jury's disposition of the factual question as to whether the defendant's conduct was anticompetitive in intent and effect or pursuant to a legitimate business purpose. In that context, this Court made a plenary review of the record and concluded that all the evidence, including the evidence of the larger competitor's foregoing of short-term benefits, "comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival." 472 U.S. at 610. Moreover, this

Court made it clear in *Aspen* that the factual issue of whether a monopolist's actions can "properly be characterized as exclusionary" necessarily involves an analysis of the effect of the conduct (1) on consumers, (2) on the competitor and (3) on the monopolist itself. 472 U.S. at 605. The Solicitor General, like Conrail, ignores evidence put forth by D&H below addressing this tripartite analysis in *Aspen* and argues that the court of appeals focused only on the harm to D&H and not on the impact on consumers.

In fact, it was Conrail's one-dimensional argument with respect to *Aspen* that led the court of appeals to focus in large part on the impact Conrail's actions had on D&H. In its briefs below, Conrail had placed overwhelming emphasis on its contention that its actions were not anticompetitive because they were prompted solely by its desire to maximize its profits. Indeed, Conrail hardly disputed D&H's contention that shippers had been harmed. As a result, the court of appeals correctly directed its attention to what it believed was Conrail's "most significant contention" with respect to whether there was "a genuine issue of material fact as to whether Conrail's make or buy policy constituted willful anticompetitive conduct," i.e., whether Conrail was insulated from liability because its policy was intended to increase short-term, as well as, long-term profits. 902 F.2d at 178 (A. 6a).

In any event, the deposition testimony of Mr. Behe indicates that certain shippers were harmed by Conrail's actions because their preferences were ignored.[4] Mr. Behe testified about a series of telexes relating to rate reductions on newsprint traffic from Quebec to Allentown and Minersville, Pennsylvania. He testified that Conrail concurred in the rate reductions that involved Conrail's routes and did not concur in the reductions that involved D&H's routes. Dep. of Michael R. Behe at 206 (Nov. 13, 1987). He also testified

4 It should be assumed that the court of appeals took note of this evidence because it stated that it had reviewed the record de novo to determine whether there are genuine issues of material fact. 902 F.2d at 177 (A. 5a).

that one of the telexes contained a handwritten note indicating that the traffic was "*all* going D&H currently." (emphasis added) (Resp. A. 4A; emphasis added.) Thus, it is evident that the shippers of newsprint from Quebec to Allentown and Minersville had a decided preference for using D&H prior to the rate reductions notwithstanding the fact that D&H's rates on those routes were equal to Conrail's at that time.

Despite this evidence of consumer preferences, the Solicitor General argues that there is no evidence that shippers, rather than the originating railroads, chose the route for traffic or cared which of two equally priced routes were selected. (Amicus at 11.) There is nothing in the record below, however, which would support this supposition and, indeed, Conrail itself has never made this argument. Additionally, this contention proceeds from the assumption that D&H and Conrail compete only in terms of price. As indicated by the foregoing example, prior to Conrail's refusals to concur in joint rates with D&H, all the traffic on the Allentown and Minersville routes might well have been "going D&H" because of non-price factors such as speed and quality of service. Indeed, Richard Hasselman, Conrail's Senior Vice-President for Operations, conceded in his deposition that D&H had the most direct route to Canada and added that he would have liked to have had that route in the Conrail system. Dep. of Richard B. Hasselman at 138 (Jan. 11, 1988). Moreover, there is no indication in *Aspen* that this Court considered the *price* of ski tickets when it analyzed whether consumers had been harmed. Rather, this Court found that consumers had been harmed because they had a decided preference for skiing all four mountains at Aspen rather than the three mountains controlled by the monopolist. *See* 472 U.S. at 606.[5]

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5 In fact, this Court has long recognized that there can be competition that is not related to price. *See, e.g., United States* v. *Terminal R.R. Ass'n*, 224 U.S. 383, 393 (1912) (the presence of more than one operator of railroad terminal facilities in St. Louis, "at least gave to carriers and shippers some choice, a condition which, if it does not lead to competition in charges, does insure competition in service").

In any event, the Solicitor General effectively concedes that his argument that D&H and Conrail could compete only in terms of price is wrong when, in the context of his argument that shippers did not prefer D&H to Conrail, he makes the statement: "If D&H offered services that shippers valued and could not obtain from Conrail, then shippers presumably would have been willing to pay a higher rate to obtain joint D&H/Conrail service." (Amicus at 11-12.)

In addition, although the Solicitor General contends that Conrail was not " 'sacrific[ing] short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival'," the record contains evidence that Conrail sacrificed consumer goodwill in order to achieve its goals. (Amicus at 13 (quoting *Aspen*, 472 U.S. at 610-11).) In *Aspen*, skiers wished to use all four mountains rather than the three offered by the larger competitor and this Court found that the larger competitor sacrificed consumer goodwill by ignoring this preference. 472 U.S. at 610-11. Similarly, in the present case, certain shippers preferred to use D&H but Conrail ignored that preference by refusing to concur in joint rates. Moreover, to suggest that *Aspen* stands for the proposition that the plaintiff in an antitrust case must proffer evidence that the defendant sacrificed short-term benefits for anticompetitive reasons erroneously elevates one evidentiary fact relied upon by this Court to a principle of law.

III.

THE COURT BELOW CORRECTLY APPLIED THE ESSENTIAL FACILITIES DOCTRINE

Once again, in discussing the court of appeals's application of the essential facilities doctrine to the present case, the Solicitor General focused solely upon Conrail's "make or buy" policy and did not discuss Conrail's refusals to concur. Additionally, while the Solicitor General does not disagree with this Court's reasoning either in *United States* v. *Terminal R.R. Ass'n*, 224 U.S. 383 (1912), or the articulation of the essential facilities doctrine by the court of appeals in *MCI*

Communications Corp. v. *American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), he argues that *Terminal Railroad* is distinguishable from the instant case because *Terminal Railroad* mandates only "*nondiscriminatory* access to an essential facility," not a "general duty to deal on 'reasonable' terms." (Amicus at 16 n.22; emphasis in original.) In fact, this Court concluded its opinion in *Terminal Railroad* by decreeing that access to the essential facility be "upon such just and reasonable terms and regulations as will in respect of use, character and cost of service, place every such company upon as nearly *an equal plane* as may be with respect to expenses and charges as that occupied by the proprietary companies." 224 U.S. at 411 (emphasis added).

Moreover, the decision below is entirely consistent with the decision of the court of appeals in *Laurel Sand & Gravel, Inc.* v. *CSX Transportation, Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,312 (4th Cir. Jan. 30, 1991), which the Solicitor General cites with approval. (Amicus at 17, 18.) In *Laurel Sand*, the Fourth Circuit concluded (as did the court below) that it is appropriate to consider whether the terms of an offer to deal are so unreasonable as to constitute denial of access to an essential facility. *See Laurel Sand*, 1991-1 Trade Cas. at 65,190. In that case, as the Solicitor General notes, the court of appeals adopted the "reasonable standard of access factor" as part of its four-part test to determine whether there has been denial of the use of an essential facility. *Id.* Nevertheless, the Solicitor General argues that the decision below conflicts with *Laurel Sand* because the court of appeals stated that the offer of access to the facility in that case "was a 'reasonable alternative' to trackage rights because it was 'reasonable from [the defendant railroad's] perspective to offer $2.12 per ton, a penny over the variable costs.' " (Amicus at 18 (quoting *Laurel Sand*).) There, the court of appeals addressed that prong of the essential facilities doctrine which requires that the plaintiff asserting an essential facilities claim demonstrate that "it could not reasonably duplicate or pursue a reasonable alternative to the essential facility." *Laurel*

Sand, 1991-1 Trade Cas. at 65,189. In *Laurel Sand*, the court held that of the three options available, i.e., duplicating the defendant's tracks, entering a joint rate agreement or leasing trackage rights, the first (as here) was "economically impractical," but the second was deemed reasonable because such access to the essential facility was offered by the defendant at a rate only marginally above its variable costs and less than that charged to plaintiff's competitors. Given these facts, one can hardly fault the court of appeals for focusing on "[the alleged monopolist's] perspective" and not requiring the monopolist to participate in a joint rate at a loss. Finally, the court of appeals concluded that the defendant in *Laurel Sand* was not required to lease trackage to the plaintiff since that would have radically altered its historical business and have "transform[ed] [it] into a 'toll collector'." 1991-1 Trade Cas. at 65,190. D&H seeks neither to force Conrail to participate in joint rates at a loss or to engage in business practices foreign to it. On the contrary, D&H simply seeks the maintenance of historic business relationships and access to Conrail's unndeniably essential facility on a "nondiscriminatory" basis.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

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Respectfully submitted,

JAMES K. MANNING
Counsel of Record
ELIZABETH STORCH
BROWN & WOOD
One World Trade Center
New York, New York 10048-0557
(212) 839-5300

Attorneys for Respondent Delaware & Hudson Railway Company